

Cardinal Hayes Home for Children and Nina Hoffman. Case 3-CA-18043

November 14, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND DEVANEY

On June 23, 1994, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Charging Party filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,¹ findings, and conclusions and to adopt the recommended Order.²

We agree with the judge that the General Counsel failed to establish a prima facie case that employee Hoffman was discharged for union activities. The judge's description of Supervisor Colich's testimony regarding her knowledge of Hoffman's union activity, however, contains contradictory statements. Thus, the judge stated that "[A]t no time prior to Hoffman's termination was she [Colich] aware that Hoffman was attempting to start a union at the facility or was discussing the Union with her fellow employees" and then stated that "[Colich] testified that two other employees told her that Hoffman told them that she felt that the employees needed a union or that she was trying to start a union at the facility."

Our review of the record shows that Colich testified that, during the July 9, 1993 meeting, she told Hoffman that Hoffman should not be complaining to the staff but should take her complaints to the personnel department. Later in this meeting, Hoffman said that her concerns were not being met and that she thought that maybe a union was needed at the facility. This was the first time that Colich heard anything about a union and Colich did not respond to Hoffman's statement. Following the July 9 meeting, Colich's supervisor told Colich to talk to the employees and find out what Hoffman's complaints were about how the Respondent was treating the residents because the Re-

spondent is required by law to investigate all allegations of resident abuse. While Colich was talking to employees, two of them told her that Hoffman had mentioned that she thought that the facility needed a union and that Hoffman would like to start a union.

Also contrary to the judge's finding, Busby, the director of resident services, testified that Colich told him about Hoffman's July 9 statement that she thought maybe a union was needed at the facility.

It is clear from a review of the record, that although Busby knew about Hoffman's statement to Colich on July 9 (maybe a union was needed at the facility), only Colich knew that Hoffman had mentioned a union to other employees. Further, Amorello, who made the decision to terminate Hoffman, had no knowledge of any statements regarding a union and no knowledge of any union activities. Under all of the circumstances of this case, including the fact that the judge found no evidence of union animus and found that Hoffman's behavior leading up to her discharge established that she refused to accept supervision, we agree with the judge that the General Counsel has failed to establish a prima facie case that Hoffman was discharged because of protected concerted activities.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Robert A. Ellison, Esq., for the General Counsel.
Joseph A. Saccomano, Esq. and Joseph Martin, Esq. (Jackson, Lewis, Schnitzler & Krupman), for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on April 28, 1994, in Poughkeepsie, New York. The complaint herein, which issued on September 30, 1993,¹ and was based on an unfair labor practice charge filed on August 16 by Nina Hoffman, an individual, alleges that in late June Cardinal Hayes Home for Children (Respondent) informed an employee not to speak about the Union at any time because it was upsetting the other employees, and terminated Hoffman on about July 22 because of her activities on behalf of Communications Workers of America, AFL-CIO (the Union), and for other concerted activities, in violation of Section 8(a)(1) and (3) of the Act.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a not-for-profit corporation organized under New York State law, has been engaged in providing residential care and treatment for developmentally disabled children and young adults at facilities in Millbrook and Pleasant Val-

¹ The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We deny the Respondent's motions to strike the Charging Party's exceptions and the General Counsel's cross-exceptions.

¹ Unless indicated otherwise, all dates referred to herein relate to the year 1993.

ley, New York, as well as at other nearby facilities. During the 12-month period preceding September 30, Respondent derived gross revenue in excess of \$1 million and, during the same period, received funds from Federal, state, and county sources in excess of \$50,000. Respondent admits, and I find, that it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

Respondent operates residential care facilities for mentally retarded and developmentally disabled children and young adults. Its main facility, containing its campus and administrative and personnel office, is located in Millbrook, New York. Respondent also operates Intermediate Care Facilities at five other locations in Dutchess County New York, including the facility at Pleasant Valley where Hoffman was employed, and the only location involved herein. The Pleasant Valley ICF (the facility), generally has about 10 patients (clients or residents), all of whom are profoundly mentally retarded. Some of these clients are nonambulatory, some have seizures, and some are PICA, which means that they are apt to ingest, or eat, anything they can get their hands on, even if it is not appropriate to do so. The facility employs three shifts: there are usually two employees on the day shift, five on the evening shift, and two on the night shift. Hoffman usually worked Wednesday through Friday from 5 to 9 p.m., Saturday and Sunday from about noon to 9 p.m., and had direct care of two or three of the clients. She was also employed full time at NYNEX, where she was shop steward for the Union.

Hoffman was employed by Respondent at the facility as a direct care worker beginning in about 1990. Between that time and her termination on July 16, she was involved in many small incidents at the facility. However, according to Respondent, the catalyst that resulted in her discharge was an incident that occurred outside the facility on July 2, combined with the fact that in January Respondent hired a new supervisor for the facility, Inga Colich. Prior to that, there had been a number of different supervisors who remained at the facility for a relatively short period.

The first "incident" involving Hoffman occurred in 1990, when her son visited the facility with his bicycle. Shortly thereafter, one of the clients took the bicycle and disappeared for about 15 minutes, returning with a cut on his knee, apparently, the result of a fall from the bike. During the investigation of this incident, Hoffman told her supervisor that she felt that the residents were not being treated properly, but refused to elaborate, stating that she might take this information to the proper state agency. By memo dated July 30, 1990, William Busby, Respondent's director of resident services, wrote to Hoffman, *inter alia*:

Today, 7/30/90, I met with your supervisor, Tara Fedigan, and reviewed the issue of your son being present at the ICF and the subsequent issue of the missing client on 7/15/90. She shared with me that during that counseling session you expressed concerns regard-

ing the way the residents at the ICF were being treated. In fact, you have apparently been keeping a running log regarding these concerns and, at one point, suggested that one of your options was to report your findings to N.Y.S. authorities. I further understand that you choose not to share your specific concerns with supervising personnel.

Under OMR/DD regulations, all employees are required to report any suspected issues of abuse/neglect to appropriate personnel within 24 hours of the act occurring. Your less than forthright approach has me concerned that you may be witnessing something which is not in the best interest of our clients and keeping it to yourself. Not only would this be a violation of law, but goes against the well established policies and procedures of Cardinal Hayes Home.

Sometime in 1991, Hoffman was told that it was inappropriate for her to be praying with the clients. In the following year, she was told not to discuss with other staff members a march on Washington against abortions. In about 1992, Hoffman saw a report on television that a medication that the facility was giving the clients "was in question." She called the poison control authorities to ask if it was acceptable to give the medication to seizure patients. She was told by supervision that she should have followed the proper chain of command rather than calling on her own and shortly thereafter she had a meeting with Busby and others where they discussed the incident. Additionally, each year, Hoffman traveled to Yugoslavia and returned with "blessed objects," which she left in the staff room of the facility for anyone who wanted them. Her supervisor asked her why the objects were there, and she said that she wasn't forcing anybody to take them, but if they wanted them they could have them. Her supervisor told her that some people were not happy with the items.

In January, Hoffman removed the screens from the windows at the facility; she testified that she removed and cleaned them because they were full of nicotine even though the facility is supposed to be a nonsmoking area. Colich testified that there were two problems with this: Hoffman was not supposed to be doing this during her direct care hours (she should have been caring for the residents), and she never put the screens back on the windows. On January 25, Colich wrote to Hoffman:

Staff would appreciate when you start a project like washing the screens that you put the screens back on the windows and not leave them in the boys' bathroom for someone else to finish.

Colich testified that when she discussed this situation with her, Hoffman said that it was Colich's problem, that she should make sure that the staff didn't smoke because with smoke all over the screens she could not breathe. In a similar incident in about May, Colich went outside the facility to smoke a cigarette, but could not find an ashtray or empty coffee can that the smokers used as ashtrays. Someone told her that Hoffman had thrown them away, and when she asked Hoffman if she did so, Hoffman admitted that she did it because it was "disgusting" and she didn't want them at the facility. Colich told her that it wasn't for her to decide, it was for those staff members who smoked.

Colich testified that in about April, Hoffman posted a notice on the subject of rape on the bulletin board in Colich's office. This bulletin board was meant for communications regarding Respondent's operation. She met with Hoffman and told her that she had previously been counseled about bringing inappropriate articles to the facility and she was not to do it again. Hoffman said that she could not believe that a Catholic agency would forbid her from posting an article such as that. Colich said that Respondent was not a Catholic agency; they are operated and governed by the State and are affiliated with the Catholic Archdiocese.

Another "incident" occurred shortly after the July 2 incident and involved the feeding of a resident. Colich testified about a problem that she had with Hoffman and the residents' meals. Respondent has "feeding goals," where they attempt to teach the residents to eat on their own as normally as possible. If the residents were fed, they would never learn to eat on their own. Hoffman "did not believe in them, and she did not want to follow them and she continued to feed them . . . instead of teaching them to feed themselves." This happened on a number of occasions and she told Hoffman of the importance of teaching the residents to feed themselves, rather than feeding them. Hoffman responded that this procedure was cruel and would hurt the residents rather than helping them. An incident occurred on July 7 with a resident named Caroline who, Colich testified, could feed herself "pretty appropriately" with a little help in slowing her down and wiping her mouth. Colich was shown an entry that Hoffman made on that day in the logbook maintained by Respondent. It said: "Caroline was a nervous wreck with having to be constantly corrected and reminded how to meet Cardinal Hayes' Standard of dinner etiquette." Colich was upset with this entry because she considered it sarcastic, and the logbook is to record resident's progress, not employee's personal opinions. After this and the other incidents, Colich decided that Hoffman would not follow Respondent's rules; rather, she would do what she felt like doing. Hoffman testified that the resident involved in this incident was "quite sick and wasn't eating," and she fed her a few mouthfuls of food and somebody reported her for this. Hoffman testified that she knows that Respondent strives to teach the residents how to eat, and she does not disagree with this goal. She does not consider the July 7 entry in the logbook to be sarcastic or improper and was never told that it was improper. Sometime between the July 2 incident and her termination meeting on July 16, Colich spoke to her about this feeding incident.

Hoffman testified that in the middle of June she called the Union (although her affidavit states that it was in July) and asked what she had to do to get a union at the facility. She was told that the first thing she had to do was get the names of five people who were interested. After that, during her break periods at the facility, she discussed the Union with three employees who said that they would be interested in signing a card for the Union, although no cards were ever signed. Hoffman was asked on direct examination if the subject of unions ever came up in discussions with Colich. She testified that sometime between the warning and her termination, Colich told her that she shouldn't be talking about "the rape crisis in Bosnia. They didn't want me to talk about rape." Hoffman asked: "What happened to the First Amendment, and why am I having my speech censored?" Hoffman

then said: "We really should consider maybe having an organized union in here so that I would have some sort of rights." She was then asked what Colich's response was, and she testified: "She was just listening to me." A few questions later she was asked: "Do you recall another conversation with Inga Colich where the subject of the union came up?" She testified:

Another time she asked me about feeding a client [presumably, the July 7 incident with Caroline], something about a procedure and again, I said, you know, we really would benefit from having a union in here because it seemed that nobody really understands what one could and could not say in the workplace . . . we did discuss the union, yes.

The next question was whether Colich responded to that statement and Hoffman answered "no." She was then asked: "Did she at any time give you any instructions with regard to the union?" Hoffman answered: "At one time she stated to me that she didn't want me talking about this because it was upsetting . . . my co-workers. I was causing low morale, I was attacking the agency." She testified that this discussion took place between the warning and the termination.

Colich testified that at a meeting that she had with Hoffman on July 9 (to be discussed more fully below), Hoffman said that her concerns were not being met and that was why she felt that a union was needed at the facility. That was the first time she had heard Hoffman comment about a union and she did not respond to this statement, although she never specifically denied telling Hoffman not to speak to the other employees about the Union. At no time prior to Hoffman's termination was she aware that Hoffman was attempting to start a union at the facility or was discussing the Union with her fellow employees. She testified that two other employees told her that Hoffman told them that she felt that the employees needed a union or that she was trying to start a union at the facility.

Henry Amorello, Respondent's director of personnel, testified that at the time that he decided to terminate Hoffman he had no knowledge of any union activity on her part and did not know that she had told Colich that she felt that a union was needed at the facility. Busby also testified that prior to Hoffman's termination, he had no knowledge that she was engaged in union activity at the facility. Respondent's witnesses testified that only Amorello had the authority to terminate employees.

On July 2, Hoffman was involved in the incident with the bushes and shrubs at the facility that Respondent alleges precipitated her discharge 2 weeks later. Hoffman testified that on that day she was asked to take a client, Christian, outside after dinner. He was on a new experimental drug and was "very, very hyper" and "rather destructive." She was told to take him outside "so he can burn up some of his energy." When they got outside, Christian began crashing through the bushes, knocking over flower pots, eating leaves, and trying to eat poison ivy that was in the flower garden. She testified:

I proceeded to pull up the poison ivy because he wanted to play on the ground outside in the flower bed. As he crashed through those bushes that were out front, he was breaking through them and they were all break-

ing off, and I did finish breaking them off because they had been torn off . . . they were all lopsided so I tried to fix them.

She testified further that, at one point, Christian was playing in the bark (wood particles often used on playground or garden surfaces) and while he was there he began to eat the poison ivy and that is when she began "weeding it out." Hoffman heard nothing further of this incident until July 4, when Colich gave her a written warning, dated that day, for the bushes incident. Colich wrote:

Nina has taken it upon herself to trim the bushes in the front yard. She did not seek supervisory approval for this, nor is Nina experienced in trimming bushes as we can see from the condition of the bushes. I also feel that Nina should be attending to her D/care duties rather than doing landscaping during program hours.

Hoffman refused to sign this warning, but in the portion entitled "Employee's Remarks," she wrote:

During the hours outside with Christian, while he was playing in bark, began to weed and trim the trees. Do not agree with the idea that I just took it upon myself to destroy property. I feel this is harassment and scandalous due to a phone call placed to the hill by a fellow employee.

When Colich gave her the warning, Hoffman told her that she thought that it was totally ridiculous. She explained that she was outside with Christian for about 2 hours, and that she was not simply engaged in landscaping. Colich said that she did what she needed to do. In the warning, under "Action to be Taken," it states: "Nina will be sent to our Associate Program Director for further counseling in this matter."

Colich testified that sometime shortly after the incident she received a telephone call from one of the staff members at the facility. She said that she wanted Colich to know what occurred so that she wouldn't be shocked when she drove into the facility, and that Hoffman used hedges or clippers taken from her car to cut down the trees and bushes while Christian was outside with her. Colich testified that she gave Hoffman the warning because "she had no business" cutting down and trimming the trees and bushes at all, since Respondent employs a landscaper to do that, but what was worse was that she had a PICA client outside with her. Although Christian is allowed to be outside with supervision, "You are to give all the attention to that client and do activities outside pertaining with that client." She told Hoffman that she should not have been doing what she did with Christian. Rather she was to follow Respondent's care plans for the clients. Hoffman disagreed with everything that she said about the incident. She said that she couldn't understand why a Catholic agency would condemn her for trying to enhance the grounds at the facility. She claimed that she was entertaining Christian while she was trimming the bushes. She also told Colich that Christian played in the bark during the entire period and that Colich was harassing her about the incident and about the screens incident and that she wanted to file a grievance about it. Colich told her that she had the right to file a grievance if she did not agree with something that she did. She testified that Respondent has a grievance

procedure, but Hoffman did not use it at that time or at any time.

Anthony Frenzel, Respondent's director of operations for support services, testified that in 1993, Respondent hired a landscape architect to design a plan for the outside of the facility and the work was completed shortly thereafter. In addition, Respondent employs an employee who cares for the landscaping at the facility on a regular basis. Shortly after July 2, Frenzel drove to the facility and saw that these bushes "were just irregularly—just cut down to almost nothing." In addition, a cable TV wire that had been laid through the dirt was exposed. He then went to the facility and asked what had occurred and was told that Hoffman had trimmed the bushes. As to his reaction to this, Frenzel testified: "I was really pissed." His reason:

Because I had what I felt to be a very good contractor. I had landscaping that we paid to have installed. It was doing what it was designed to do, and I just felt that it was really inappropriate for anybody to just go out and cut those things down.

Later that day he called Janet Dykman, Respondent's assistant program director. He told her how angry he was about what occurred for two reasons: what Hoffman had done to the bushes, and the fact that Christian, who was PICA, was obviously left unattended while Hoffman was cutting down the shrubbery. He told her that he felt that anybody who did that should be fired, but Dykman did not commit to any particular action. Frenzel testified that his department is responsible for the maintenance and modifications of resident's rooms. He has modified most aspects of Christian's room because of his "self-injurious behavior" of falling off the bed and hitting himself. In addition, they make sure that there is nothing loose in his room that he could attempt to ingest.

Busby testified that Colich and Dykman told him of the incident shortly after it occurred. After learning of it, his concerns were that Hoffman did it while she was supervising a client who needed constant supervision, and that she engaged in this landscaping process without any authority to do so. He recommended that Colich have a counseling session with Hoffman, which Colich testified took place on July 9.

Colich testified that shortly after giving Hoffman the warning, she received a message from the senior worker at the facility saying that one of the employees told her that "she can't take Nina's complaining anymore," and that the rest of the staff at the facility said: "Please do something about this." On July 9 Colich met with Hoffman and told her that many members of the staff said that they were sick and tired of her complaining. She was complaining about bringing lawyers to the facility, complaining about the Respondent, and complaining about Colich and her writeups. That if she had any complaints, she should notify Respondent's personnel department. Hoffman asked her why she was telling her that when other employees were complaining. Colich said that she was the one doing all the complaining. Hoffman then said that "she hates Cardinal Hayes, hates this unit and hates all the units in Cardinal Hayes and wouldn't go work in any of them." Colich asked: "If you hate Cardinal Hayes so much, why are you still here?" Hoffman said: "That is a harassing question and I will use that against you." She also said that she remained at the facility "be-

cause these are God's children and they need my help and my protection." Colich then went over the past problems that Hoffman had, as discussed above, and Hoffman did not agree with her assessment of the incidents. She told Colich: "I cannot believe you, as a Catholic, can not understand my views on these things." Colich told her that religion had nothing to do with it. She then asked Colich if her grievance had begun and Colich told her that she had to file a grievance by calling Amorello in order to begin the procedure. Colich then called Amorello and told him that Hoffman wanted to meet with him and file a grievance; Amorello said "fine," and set up an appointment for about 3 days later. Colich then told Hoffman of the appointment to meet with Amorello and Hoffman said that she could not be there without her lawyer, and her "lawyer cannot jump to Cardinal Hayes' wishes quickly." When Colich asked her why she needed a lawyer, she said that she spoke to a priest in the Archdiocese about "how horrible we were treating our clients and the horrible things going on there," and he told her not to go to any meetings without a lawyer. Colich testified that it was at this meeting that Hoffman referred to a union for the first time; she said that because her concerns were not being heard, she felt that the employees needed a union, but she did not respond to this statement. At the conclusion of the meeting Hoffman told Colich that she was a poor supervisor and that when they got to Amorello's office, "we'll see what happens to you." At the conclusion of this meeting Colich called Dykman and told her what Hoffman said and Dykman said: "Let's start to counsel her out of here." She told Colich to speak to Hoffman's fellow employees to see who she told that the Respondent was improperly treating the residents. Shortly after this meeting, Colich told Busby what happened and Busby told her that he felt that Hoffman was the type of employee who refused to accept supervision, and both Colich and Dykman recommended that she be terminated. On the following day, Colich told Amorello that she did not want Hoffman in her unit; she didn't listen, didn't properly perform her job, and every time told her something, Hoffman alleged that she was being harassed.

Hoffman, Colich, Busby, and Amorello met on July 15 or 16 in Amorello's office. Prior to meeting with Hoffman, Colich, and Busby told Amorello that they felt that Hoffman should be terminated because of her poor work performance and her inability to accept supervision, and Amorello agreed. Colich did not tell them of Hoffman's statement made at the July 9 meeting that she felt the employees needed a union. Hoffman testified that at this meeting they said that she was causing low morale and was not meeting their standards of supervision. They told her that she would not work out at the agency and that "dismissal would be the right way to go." She could say that she resigned and they would give her a good recommendation. Colich testified that at this meeting she told Hoffman that her work performance was poor and that she was incapable of accepting supervision. She also said that every time she spoke to her, Hoffman claimed that she was harassing her. Busby then said that Hoffman's values and mission were different from Respondent's. Colich and Busby then left the room and Amorello and Hoffman spoke. Busby testified that at this meeting he told Hoffman that they did not view her as an evil person; rather they saw her as someone who cared about the residents, but did not prescribe to their mission and direction for the cli-

ents. Since she spoke openly about her negative feelings for the Respondent and its management, it would be best that she no longer work there, and that was his recommendation to Amorello. He and Colich then left the room. Amorello testified that he met with Colich and Busby prior to this meeting and they recommended that she be terminated. Prior to making the final decision on the matter, he reviewed her personnel record. With Hoffman present, Busby reviewed her situation and recommended that she be terminated. After Busby and Colich left the room, Hoffman said to Amorello: "Did you see how she looked at me?" He did not respond. He told her that she was a caring person, but that if she wanted to continue working in this field, it would be to her advantage to work with the elderly where she could give total care, which was not Respondent's philosophy of teaching the residents to care for themselves. Hoffman responded: "I'm not Mother Theresa." At that time he had no knowledge that Hoffman was engaged in any union activity at the facility.

General Counsel alleges disparate treatment between the way Respondent handled Hoffman's termination and the discipline of Diana Struthers, the acting supervisor at the facility prior to the employment of Colich. Hoffman testified that Struthers was originally dismissed in about March for causing low morale, and the dismissal was changed to a transfer to a different facility. Colich testified that Struthers was transferred out of her department in May due to her inability to accept Colich's supervision and her poor job performance. Colich took over from her while she was acting supervisor, and Struthers apparently had difficulty with that. Colich recommended that she be transferred to another unit and Amorello made that determination. Colich testified that she considered Hoffman's job performance worse than Struthers':

For one thing, Diana, she understood the mission, the values. She understood the teaching of the mentally retarded and the importance of it and she was very consistent in her work in that area, whereas Nina Hoffman did not agree with our developmental goals, with our behavior plan. She made it known that she didn't agree with them and didn't do it. There was no reason to have her leave my unit and go to another unit. In my opinion, she does not belong at Cardinal Hayes.

Amorello testified that Struthers' problem was that she resisted Colich's supervisory authority. Colich recommended that Struthers be terminated, but Struthers asked for a transfer, and she was transferred to the Millbrook facility. He never considered similarly transferring Hoffman because "they were not comparable situations."

IV. ANALYSIS

The initial allegation is that Respondent, by Colich, in about late June, informed Hoffman not to speak about the Union at any time because it was upsetting the other employees. From my observation of the witnesses and examination of the record herein, I would credit Colich that she never responded to Hoffman's statement made at the July 9 meeting that the employees should consider having a union represent them. I found Colich to be a credible witness who was attempting to testify in an honest and truthful manner and would credit her testimony over Hoffman's. In addition, it

took Hoffman three tries before she testified about Colich's alleged statement. First she testified that Colich just listened to her statement, then she testified that Colich did not respond to her statement, then she testified that Colich told her that she didn't want her talking about "this" because it was upsetting the other workers. I find that it is more likely that Colich told Hoffman that her complaints about Colich and the operation of the facility were upsetting her coworkers. I would therefore recommend that this allegation be dismissed.

The final allegation is that Respondent discharged Hoffman on about July 16 because of her union activities in violation of Section 8(a)(1) and (3) of the Act. Under the rule set forth in *Wright Line*, 251 NLRB 1083 (1980), the General Counsel has the initial burden of making a prima facie showing to support the inference that the employee's protected conduct was a "motivating factor" in the employer's decision. If General Counsel satisfies that burden, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. I find that the General Counsel has not sustained his initial burden herein. As stated above, I found Colich to be a credible witness. Frenzel, Busby, and Amorello were also credible and believable witnesses. Their testimony convinces me that Hoffman, while a caring person, was a free spirit who did not like being supervised. Apparently, prior to January, when Colich became her supervisor, she was able to act freely without too much fear of strong supervision. But even prior to that time, Hoffman had a number of disciplinary problems at work, beginning with the bicycle incident in 1990. All this reached a head with the July 2 incident. While Hoffman's testimony makes light of this incident, I agree with Respondent's argument of the seriousness of the incident. There are two separate violations of her responsibilities as I see it, one to the resident and one to Respondent. She was outside with a resident whom she described as "very, very hyper." Anybody who has done any work on his/her lawn, or any landscaping, knows that you cannot perform this work while supervising even well-behaved children. Properly supervising a destructive PICA resident while doing this landscaping is impossible. The other (to me) less serious violation is that it again showed that Hoffman would do whatever she wanted to do, just as she had thrown away the ashtrays and removed the window screens without replacing them earlier in the year. I therefore find that July 4 warning was an appropriate response to Hoffman's actions on July 2.

Unfortunately for Hoffman, that was not the end of it. After the warning, Colich received complaints from other employees at the facility about Hoffman's complaints. In addition, on July 7, Hoffman refused to follow Respondent's feeding plan and made the sarcastic comment in the logbook

involving Caroline. At their July 9 meeting with Hoffman, rather than being contrite, Hoffman increased the volume of her criticism of Colich and Respondent; that was, apparently, the last straw. Hoffman, Busby, Dykman, and Amorello all agreed that she should be fired. General Counsel's case rests solely on the fact that at the July 9 meeting, Hoffman referred to the Union. What she said was that the employees "should consider maybe" having a union represent them. It was a theoretical statement of possibly having a union. She did not say that she had done anything to get a union to organize Respondent's employees and, in fact, she hadn't done anything concrete. Colich did not respond to this statement and there is no evidence whatsoever of union animus. Additionally, neither Busby, Dykman, or Amorello knew of Hoffman's July 9 statement when they each decided that she should be fired. Rather, it appears, that Respondent considered Hoffman's action on July 2 as the final piece of evidence that she would not accept their supervision, and her subsequent actions reinforced that conclusion. I therefore find that General Counsel has not sustained his initial burden that Hoffman was terminated because of her union activities. I therefore recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

1. Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate Section 8(a)(1) of the Act as alleged in the complaint.

4. Respondent did not terminate Nina Hoffman in violation of Section 8(a)(1) and (3) of the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

It having been found and concluded that Respondent has not engaged in the unfair labor practices alleged in the complaint, the complaint is hereby dismissed in its entirety.³

²If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³The unopposed motion of counsel for the General Counsel contained at p. 15 of his brief, to correct the transcript at certain specified places, is granted.